NO. 82-1066

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

UNITED STATES OF AMERICA, *Appellant*

V.

HARRY PTASYNSKI, *et al.*, *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

MOTION OF APPELLEE THE STATE OF TEXAS TO AFFIRM

JIM MATTOX
Attorney General of Texas

ANDREW KEVER *
Assistant Attorney General
Chief, Energy Division

CYNTHIA MARSHALL SULLIVAN
Assistant Attorney General

P.O. Box 12548, Captiol Station
Austin, Texas 78711
(512) 479-8191

Attorneys for the State of Texas
**Counsel of Record*

OF COUNSEL:

David B. Kennedy
KENNEDY & CONNOR
P.O. Box 607
Sheridan, Wyoming 82801
(307) 672-2491

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: **PAGE**

CONSTITUTION AND STATUTES:

MISCELLANEOUS:

NO. 82-1066

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

UNITED STATES OF AMERICA, *Appellant*

V.

HARRY PTASYNSKI, *et al., Appellees*

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF WYOMING

MOTION OF APPELLEE THE STATE OF TEXAS TO AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court, the State of Texas, an intervening plaintiff below and an appellee herein, moves for summary affirmance of the judgment of the United States District Court for the District of Wyoming that Title I of the Crude Oil Windfall Profit Tax Act of 1980, I.R.C. §§4986-4998 ("the Tax"), violates article I, section 8, clause 1 of the United States Constitution ("the Uniformity Clause"). The questions on which the decision of the cause depends are so insubstantial as not to require further argument.

STATEMENT

Since the Memorandum Opinion, Amended Judgment, text of the Tax and text of the Uniformity Clause are included as appendices in the federal government's Jurisdictional Statement, these attachments are not reproduced herein.

The motions filed by the other appellees have fully set out a description of the proceedings below. The federal government has noted the potential magnitude of the amounts at stake in this action. *See* J. S., 8. The loss of revenues accruable to the government under the Windfall Profit Tax Act, however, cannot eclipse the question of the tax's constitutionality.

The courts have construed the Uniformity Clause to compel nothing more and nothing less than geographic uniformity. Appellee the State of Texas, as one of the states which the Constitition protects from excises that discriminate unfairly and injuriously, has a special interest in seeing that the integrity of the Uniformity Clause is preserved by the affirmance of the District Court's judgment.

ARGUMENT

From the earliest case construing the Uniformity Clause through the present, the words "uniform throughout the United States" have been held to mean strictly geographic uniformity. By excluding exempt Alaskan oil from taxation, the Windfall Profit Tax Act creates classifications based solely on the geographical location of the tax's subject and thus is unconstitutional. Case law has not made an exception where a tax that is geographically non-uniform was legislated by a congressional majority in favor of a minority. Similarly, no court has construed the Uniformity Clause to permit deviation from geographical uniformity on grounds that

non-uniformity is justified by rational considerations, and, indeed, to do so would render the Clause meaningless. That Congress could have effected results similar to those it sought by establishing classifications based on a defined class of taxpayers or a particular subject of taxation is also immaterial. The Tax, by exempting Alaskan oil strictly on the basis of the geographical location of its production, violates the Constitution.

Severance of the constitutionally infirm provision to save the Tax is, in this instance, inappropriate. The general separability clause of the Internal Revenue Code should not be applied to sever the exempt Alaskan oil provision. Whether severance of the Alaska exemption is proper is a determination which must be made by looking to the entirety of the Tax's legislative history. That history confirms that the Alaska exemption was integral to the political compromise necessary for passage of the Tax. The Alaska exemption was also integral to Congress' attempt to balance the Windfall Profit Tax Act's generation of tax revenues against incentives to encourage domestic oil exploration and production. Severance of the Alaska exemption and the resulting extension of the excise to the production which Congress believed should be protected would disrupt that careful balance and constitute improper judicial legislation.

A. THERE IS NO SUBSTANTIAL QUESTION AS TO THE CORRECTNESS OF THE DISTRICT COURT'S HOLDING THAT THE TAX VIOLATES THE CONSTITUTIONAL REQUIREMENT OF UNIFORMITY.

Article I, section 8, clause 1 of the United States Constitution provides:

> The Congress shall have Power to lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the Common Defense, and General Welfare of the United States; *but all* Duties, Imposts, and *Excises, shall be uniform throughout the United States.* (Emphasis added.)

The Windfall Profit Tax Act imposes, by its own terms, an excise tax. *See* I.R.C. §4986(a). As the federal government has noted, the excise is imposed on the activity of mineral extraction, specifically the production of crude oil. *See* J. S., 14-15, n. 22. The Uniformity Clause compels that the tax operate with the same force in every place where the subject of the tax—that is, the production of domestic crude oil—is found. Yet the Tax provides at Section 4991 that "exempt Alaskan oil" is not taxable, thus blocking the operation of the excise on certain production of oil solely on the basis of its geographic location. The exemption of Alaskan oil is, on its face, unconstitutional.

It is not the fact that more oil is produced in Texas than in Vermont which makes the tax non-uniform. To hold a tax invalid on this basis would imply a requirement of "intrinsic" uniformity. The courts have consistently rejected this interpretation of the Uniformity Clause and instead have required "geographic" uniformity. Thus, what renders the tax non-uniform is the different treatment of oil produced in different states.

The Supreme Court has required strict enforcement of the uniformity limitation, as demonstrated through an unbroken line of cases beginning in 1796 with *Hylton v. United States,* 3 U.S. (3 Dall.) 171 (1796). In that case, Justice Paterson, who was a delegate to the Constitutional Convention, observed that the Clause by its very certainty and simplicity was intended to appease states' fears that other states might not have to participate in

the "mutual sacrifices and concessions" of nation taxation. *Id.*, 175-78. In the *Head Money Cases, sub. nom. Edye v. Robertson,* 112 U.S. 580 (1884), this Court noted that a "tax is uniform when it operates with the same force and effect in every place where the subject of it is found." *Id.*, 594.

In *Knowlton v. Moore,* 178 U.S. 41, 20 S.Ct. 747 (1900), the Court's analysis of the history of the adoption of the Constitution led to the conclusion that the words "uniform throughout the United States" mean simply geographic uniformity. The Court recognized that the Articles of Confederation had paralyzed the Continental Congress by failing to empower the government to enforce taxes necessary to sustain its needs. As the Continental Congress struggled to overcome this problem, the only question concerning restraint of the proposed taxing power was its operation upon the respective states. Moreover, "[t]he proceedings of the Continental Congress also make it clear that the words 'uniform throughout the United States,' which were afterwards inserted in the Constitution of the United States, had, prior to its adoption, been frequently used, and always with reference purely to a geographical uniformity." *Id.*, 769. Debate of a similar nature took place at the Constitutional Convention, where the delegates finally subjected Congress' power to levy duties, imposts and excises "to the requirement of uniformity throughout the United States, these words . . . having acquired at that time an unquestioned meaning." *Id.*, 771. Subsequent decisions have consistently upheld this *per se* application of the Uniformity Clause to require geographic uniformity. *See La Belle Iron Works v. United States,* 256 U.S. 377, 392-393 (1921); *Bromley v. McCaughn,* 280 U.S. 124 (1929); *Fernandez v. Wiener,* 326 U.S. 340 (1945).

The federal government claims that the Uniformity Clause was intended to stop Congressional "combina-

tions" that might injure the "vital interests" of one region. *See* J. S., 14. In similar fashion, the federal government suggests that the constitutional requirement for uniformity merely prevents "combinations" from passing tax legislation preferential to their own states or oppressively discriminatory as to a congressional minority. *Id.*, 17. Certainly the object of the Uniformity Clause is to protect the states from unfair, discriminatory acts by Congress. *See Downes v. Bidwell*, 182 U.S. 244, 278 (1901). There is, however, no indication in the case law that the strong protection for states' interests embodied in the Uniformity Clause was meant to be diluted by allowing preferences approved by a large majority of states, or discriminations involving something other than "vital interests," or any other vagaries of judicial interpretation. The uniformity requirement is phrased in absolute terms.

The federal government submits that the inquiry into the legitimacy of the Alaska exemption cannot be separated from the question whether the exemption is supported by rational considerations. Even assuming the reasonableness of congressional concerns in drawing the Alaska exemption and the relationship of the exemption to those concerns, the Uniformity Clause functions as a strict prohibition against establishing excise tax rates or exemptions based solely on geography, *regardless* of the reason. There is no jurisprudence construing the constitutional requirement for uniformity so narrowly as to permit geographic non-uniformity where the absence of uniformity is "justified" by some rational basis. To apply the rational relation test to the Uniformity Clause would render the clause superfluous.

Finally, the federal government argues that Congress could have excluded from taxation the production covered by the Alaska exemption by phrasing the exemption in terms of extreme climatic conditions and suggests that the Tax should not be held unconstitu-

tional on the basis of technical errors in congressional draftsmanship. *See* J.S., 20. As noted in the Motion of Taxpayer and Association Appellees to Affirm, if Congress has a real concern about the adverse impact of the tax on crude oil production in harsh environments, it may prescribe general exemptions not only for oil produced at specified low temperatures, but also for oil produced under other marginal conditions which incur high costs. Such exemptions, however, would have to apply anywhere the defined climatic conditions exist, not just within the state of Alaska.

In *Railway Labor Executives Assn. v. Gibbons*, 455 U.S. 457 (1982), the Court dealt with a challenge to bankruptcy legislation which is closely analogous to appellees' challenge of the Tax. At issue were provisions of the Rock Island Transition and Employee Assistance Act, Pub. L. No. 96-254, 94 Stat. 399 ("RITA"), regarding certain protection arrangements for employees of the bankrupt Rock Island Railroad. Just as the Windfall Profit Tax Act provides for tax relief strictly on the basis of geographic location rather than on the basis of a defined class of taxpayers or production problems, RITA covered one particular problem of one bankrupt railroad rather than addressing a defined class of debtors. Just as rational considerations are offered to validate the Alaska exemption despite its unconstitutionality, the crisis which precipitated enactment of RITA was offered as sufficient reason to disregard its constitutional infirmities. The Court held that a law must apply uniformly to a defined class of debtors in order to pass scrutiny under article I, section 8, clause 4 of the Constitution, the requirement for uniformity in bankruptcy laws, and that RITA did not survive such scrutiny.

Excise taxes, like bankruptcy statutes, must be uniform. When the uniformity requirement applies, no rational relationship test or other interpretations sug-

gested by the federal government may justify deviation therefrom.

B. THERE IS NO SUBSTANTIAL QUESTION AS TO THE CORRECTNESS OF THE DISTRICT COURT'S HOLDING THAT THE INVALIDITY OF THE "ALASKAN OIL EXEMPTION" RENDERED THE ENTIRE TAX INVALID.

The federal government argues that the general separability provision of the Internal Revenue Code of 1954, I.R.C. §7852(a), should be applied to preserve all of the taxing provisions of the Windfall Profit Tax Act that are "unaffected" by the invalid provisions. J.S., 21. Section 7852(a) provides that "[i]f any provision of this title, or the application thereof to any person or circumstances, is held invalid, the remainder of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby." This clause originated in the 1918 Revenue Act, at which time the income tax law was literally re-enacted by each successive Congress. The purpose of the clause there was to prevent the nation from being left without a taxing statute between sessions of Congress in the event one part of the statute was held invalid. The separability clause was never intended to save a single provision of the Internal Revenue Code if an integral element of that provision has been found unconstitutional. In any event, the court below did not rule that Section 7852(a) is not applicable, but rather noted that "its aid in clarification of this matter is minimal" and that "a holding can be reached without reliance on or disaffirmance of the clause." Memorandum Opinion, 11.

Even if Section 7852(a) *is* used to aid in clarification of the separability issue, it is merely an aid, not "an inexorable command." *Dorchy v. Kansas,* 264 U.S. 286, 290

(1924). The existence of a separability clause simply shifts to the statute's challenger the burden of showing the provisions' inseparability. Whether the presumption favors the statute's challenger or its advocate, in every case the determination of separability is to be made by looking to the intent of the lawmakers. *Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936). A fair approach to solving the problem is to suppose that while that bill was pending in Congress, a motion to strike the provisions later held invalid had prevailed. One should then inquire whether Congress, notwithstanding, probably would not have passed the other provisions of the proposed legislation. *Id.*, 313. Whether elimination of the constitutionality infirm provisions would alter the substantive reach of the statute and leave completely unchanged its basic operative structure is also determinative. *See United States v. Jackson*, 390 U.S. 570, 586 (1968).

The federal government argues that Senator Russell Long's statement that the excise will apply to Alaska, should the exempt Alaskan oil provision be invalidated, is representative of Congressional intent, since no contrary views were expressed. *See* J.S., 23-24. Although Senator Long's statement indicates his opinion on the separability issue, it is not indicative of the sentiment of the entire Congress on this question. Legislative history shows that Senator Long was the only member of Congress who voiced support of an extension of the tax to Alaska in the event the Alaska exemption was invalidated. There was neither discussion nor a vote upon separability of the Alaska exemption.

The federal government claims that legislative history indicates that Congress did not consider the deterrent effect of a windfall profit tax on the development of Alaskan oil so critical that it would have rejected the tax without the Alaska exemption. *See* J.S., 24. The legislative record, on the contrary, reflects the serious

concern of the members of Congress over extension of the tax to Alaskan oil. The House Ways and Means Committee approved a bill with an exemption for Alaskan oil produced north of the Artic Circle, except for the Sadlerochit reserves already in production. H.R. Rep. No. 304, 96th Cong., 2d Sess. 30, *reprinted in* [1980] U.S. Code Cong. & Ad. News 587, 612. The Senate Finance Committee bill exempted *all* newly discovered oil, including production covered by the Alaska exemption. S. Rep. No. 394, 96th Cong., 2d Sess. 35-37, *reprinted in* [1980] U.S. Code Cong. & Ad. News 410, 444-446. The amendment approved by the Senate majority extended the tax to newly discovered oil, but, like the Ways and Means bill, exempted Alaskan oil. This amendment resulted from extensive negotiations in which Senator Ted Stevens of Alaska, the minority leader, played a significant role. 125 Cong. Rec. S18564, S18566 (daily ed. Dec. 14, 1979). Senator Stevens stated his reluctant approval of the compromise and his firm opposition to any additional amendment which would increase the tax on Alaskan oil. 125 Cong. Rec. S18565 (daily ed. Dec. 14, 1979). In view of Senator Stevens' role in the negotiations, the Alaska exemption was an integral part of the political compromise needed to pass the bill. The District Court correctly ruled that "the Act as it exists today would not have been passed without the invalid Alaska provision." Memorandum Opinion, 11.

Aside from the political aspects of compromise in the legislation, Congress did not, as a policy matter, intend to tax the exempted Alaskan oil. As the federal government has observed, the primary objective of the windfall profit tax was to heavily tax "old" oil, whose production Congress believed was unlikely to increase as prices rose, and to impose a relatively low tax rate on "new" oil, whose production Congress believed would be responsive to price. *See* J.S., 10. In other words, Congress sought to balance the generation of tax revenues

against providing incentives to increase domestic oil exploration and production. The result of this delicate congressional balancing of interests is a complex statute. A critical element of this balancing effort is the Windfall Profit Tax Act's exemption of certain production, including Alaskan oil. To disrupt this balance by severing the Alaskan exemption and thereby extending the tax to Alaska would be to appropriate what is properly a legislative function.[1]

The policy against judicial legislation was aptly stated in *Davis v. Wallace*, 257 U.S. 478, 484-485 (1922):

> Where an excepting provision in a statute is found unconstitutional, courts very generally hold that this does not work an enlargement of the scope or operation of other provisions with which that provision was enacted, and which it was intended to qualify or restrain. ... Here the excepting provision was in the statue when it was enacted, and there can be no doubt that the Legislature intended that the meaning of the other provisions should be taken as restricted accordingly. Only with the restricted meaning did they receive the legislative sanction which was essential to make them part of the statute law...; and *no other authority is competent to give them a larger application.* (Emphasis added.)

1. The federal government has cited *Utah Power & Light Co. v. Pfost*, 286 U.S. 165 (1965), in support of its conclusion that the Tax, as primarily a revenue-raising measure, should be preserved despite the invalidity of a specific exemption. *see* J.S., 25. As pointed out in the Motion of Appellee the State of Louisiana to Affirm, the Dictum dited is not applicable in the instant case. The Windfall Profit Tax Act is not strictly a revenye-raiser, but rather balances the need for tax revenues against incentives to encourage domestic exploration and production.

See also McCorkle v. United States, 559 F.2d 1258 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978). This reluctance to legislate by judicial fiat is particularly appropriate where Congress has passed "specific, carefully-tailored legislation." *United States v. General Douglas MacArthur Senior Village, Inc.*, 470 F.2d 675, 679 (2d Cir. 1972), *cert. denied*, 412 U.S. 922 (1973). (Hereinafter "*MacArthur Sr. Vill.*")[2] Only with the Alaska exemption and the resulting incentive to continue to explore for and produce Alaskan oil did the Tax pass, and no authority other than Congress is competent to give the excise larger application. Congress has amended its past actions, especially in energy matters, on many occasions and has, in fact, amended the very statute at issue here. It is solely within the province of Congress to amend the tax to conform with the Constitution, while pursuing the objectives of Congress' own design. The court below properly concluded that severance of the Alaska exemption and the resulting extension of the excise to all crude oil produced in Alaska would amount to impermissible judicial legislation.

---

2. The federal government suggests that, if the district court was justified in refusing to extend the tax to production subject to the Alaska exemption, it should have preserved that exemption by upholding the tax on "old" oil and exempting all "new" oil, including Alaskan production. Such gerrymandering is precisely what courts have avoided for the reason that "it would be inappropriate ... to undertake piecemeal extensions of the principles reflected in this legislation merely because it is desirable, especially in view of the fact that Congress saw fit not to provide for these extensions." *MacArthur Sr. Vill.* at 679.

CONCLUSION

For the reasons set forth above, the decision of the District Court should be summarily affirmed, there being no substantial question as to the correctness of that decision.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

ANDREW KEVER*
Assistant Attorney General
Chief, Energy Division

CYNTHIA MARSHALL SULLIVAN
Assitant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711

Attorneys for the State of Texas
**Counsel of Record*

OF COUNSEL

David B. Kennedy
KENNEDY & CONNOR
P.O. Box 607
Sheridan, Wyoming 82801
(307) 672-2491